

## **DETAILED ACTION**

Receipt of Amendments/Remarks filed on March 17, 2008 is acknowledged. Claims 1-8 are pending. In response to the Restriction Requirement filed on October 12, 2007, Applicant elected Group I, claims 1-4 and 8, without traverse. Claims 5-7 are withdrawn as being directed to a non-elected invention. Claims 1-4 and 8 are being examined for patentability.

### ***Priority***

Priority to German Foreign Application 10226222.5 filed on June 13, 2002 is acknowledged.

### ***Information Disclosure Statement***

The Information Disclosure Statements (IDS) submitted on November 16, 2005 is being considered by the examiner.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct

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from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-4 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 5 of copending Application No. 10/587,143 in view of Gore et al. (US Patent 6,146,652). Although the conflicting claims are not identical, they are not patentably distinct from each other because the instantly claimed subject matter embraces or is embraced by the copending application. The copending application recites the same composition; a powder comprising at least one agrochemical (imidacloprid and/or carpropamid) and optionally, one or more additives. The difference between the instant application and the invention of Application No. 10/587,143 is that the instant invention requires the use of at least one copolymer of styrene and acrylonitrile as opposed to the use of at least one polyurethane or polyurethane urea. For this reason, the teaching of Gore et al. is joined. Gore et al. teach the use of suitable monomers such as styrene and acrylonitrile (column 4, lines 1-23) and the combination of these monomers to form copolymers (column 5, lines 23-27) for use in a pesticide composition. It would have been obvious

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to one of ordinary skill in the art to substitute polyurethane or polyurethane urea with a copolymer of styrene and acrylonitrile with the expected benefit of reducing the rate of crystallization of the pesticide active ingredient. As a result of using a copolymer of styrene and acrylonitrile, the pesticide active ingredient maintains its efficacy (see Gore et al., column 1, lines 20-25). From this extensive overlap of subject matter, one of ordinary skill in the art would recognize that the same product is taught in the copending application in view of Gore et al.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

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4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-4 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gore et al. (US Patent 6,146,652) in view of Botts et al. (WO 99/00013).

### ***Applicant's Invention***

Applicant claims powder formulations which have a particle diameter of under 125  $\mu\text{m}$  consisting of 1-50% by weight of imidacloprid and/or carpropamid, 25-35% by weight of at least one copolymer of styrene and acrylonitrile with an acrylonitrile content of between 20 and 40% by weight, and additives, if appropriate. Applicant also claims a

plant treatment composition containing the aforementioned powder formulation in addition to extenders and/or surfactants.

***Determination of the scope and the content of the prior art  
(MPEP 2141.01)***

Gore et al. teach a pesticide composition in which at least one of the components of the composition is a polymeric material which reduces the rate of crystallization of the pesticide active ingredient in the composition (abstract, claims 1 and 4 of instant application). Gore et al. teach the concentration of the polymers to be used for the invention are from about 0.001-40% (column 2, lines 1 and 2, claims 2 and 4 of instant application) and that the pesticide may comprise from 0.01 to 99.9% by weight of the composition (column 2, lines 22-24, claim 4 of instant application). Gore et al. teach the use of suitable monomers such as styrene and acrylonitrile (column 4, lines 1-23, claims 1 and 4 of instant application) and the combination of these monomers to form copolymers (column 5, lines 23-27, claim 1 of instant application) for use in a pesticide composition. Additionally, Gore et al. teach that the composition can be applied as dusts or wettable powders (column 9, lines 11-13, claim 1 of instant application) and may also contain surfactants as well as other additives such as dispersants, spreaders, stickers, antifoam agents, and emulsifiers (column 9, lines 19-23, claims 1 and 8 of instant application).

***Ascertainment of the difference between the prior art and the claims  
(MPEP 2141.02)***

The difference between the invention of the instant application and that of Gore et al. is that the instant invention requires a particulate having a diameter less than 125  $\mu\text{m}$  and that the agrochemical active compounds are imidacloprid and carpropamid. It is for this reason that the teaching of Botts et al. is joined. Botts et al. teach microparticles in a wettable powder composition (page 2, lines 20-21, claim 1 of instant application) containing one or more agricultural active ingredients such as imidacloprid (page 13, lines 5-13, claim 3 of instant application) entrapped in polymeric matrixes for forming microparticles having a diameter in the range from about 0.2 to 200 microns (abstract, claim 1 of instant application)

***Finding of prima facie obviousness***

***Rationale and Motivation (MPEP 2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of the two cited references to arrive at a powder formulation consisting of at least one copolymer of styrene and acrylonitrile and at least one agrochemical present as imidacloprid and/or carpropamid. One would have been motivated to make this combination in order to receive the expected benefit of maintaining the efficacy of the active ingredient (Gore et al., abstract) to be released during the entire growing season of a plant. "It would be prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose in order to form a resultant composition that is to be used for the very same purpose; the idea of combining them flows logically from their having been individually taught in prior art." In re Kerkhoven, 205 USPQ 1069 (C.C.P.A. 1980).

### ***Conclusion***

None of the claims are allowed.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR Only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>.

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Should you have questions on access to the Private PAIR system, contact the Electron Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Courtney Brown, whose telephone number is 571-270-3284. The examiner can normally be reached on Monday-Friday from 8 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's Supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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